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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 155

EMPLOYERS REINSURANCE CORPORATION,
Petitioner,

vs.

RANDOLPH BRYANT, UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF TEXAS,

---

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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EMPLOYERS REINSURANCE CORPORATION,
Petitioner,

vs.

RANDOLPH BRYANT, UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF TEXAS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Supreme Court of the United States:

Your petitioner, Employers Reinsurance Corporation, makes application herein for writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review and revise the decision and judgment of said Circuit Court of Appeals in the matter of Employers Reinsurance Corporation praying for a writ of mandamus and a writ of prohibition, numbered 8040 on the Docket of said Court, and in support thereof, respectfully shows to the Court the following:

I.

The decision and judgment of the United States Circuit Court of Appeals for the Fifth Circuit in effect refused to review or revise an order of the Honorable Randolph Bryant, Judge of the District Court of the United States for the Eastern District of Texas, entered in cause No. 3352 at Law, styled W. J. Clark *vs.* Employers Reinsurance Corporation pending in said Court, remanding said cause, admittedly properly removed to the District Court of the United States for the Eastern District of Texas, to the District Court for the 124th Judicial District of Texas, Gregg County, Texas, in order that service of process might be obtained upon the defendant below, petitioner herein. The cause last referred to was originally filed by W. J. Clark, plaintiff below, against petitioner Employers Reinsurance Corporation in the said District Court for the 124th Judicial District of Texas, seeking recovery against petitioner upon a policy of Workmen's Compensation Insurance alleged to have been issued by petitioner to the employer, Shell Petroleum Corporation (R. 1-2). Thereafter, petitioner duly and timely filed its petition and bond for removal of said cause to the District Court of the United States for the Eastern District of Texas, and same was duly removed to and filed upon the law docket of said Court, No. 3352 at Law (R. 2, 15). Petitioner, appearing specially only, thereupon filed its plea to the jurisdiction of said District Court of the United States for the Eastern District of Texas, reciting that petitioner was not properly before the Court, having never been served with due and proper service, and moved to quash the citation theretofore issued out of the District Court for the 124th Judicial District of Texas and the return thereon showing service thereof upon one John R. Young, on the ground that said Young was not, at the time of the filing of said suit or the issuance

of said citation or the service thereof, an agent of petitioner (R. 12-13). Thereafter, without waiting for the ruling of the Honorable Judge of the District Court of the United States for the Eastern District of Texas, the plaintiff, W. J. Clark, caused to be issued out of said court, citation directed to one E. C. Gaines, which was served upon said Gaines by the United States Marshal for the Western District of Texas, at Austin, in said District (R. 13-14). Thereupon, again appearing specially only, petitioner renewed in said District Court of the United States for the Eastern District of Texas, its plea to the jurisdiction of said court on the ground that it had not been served in said cause by due and proper service, and moved to quash the citation and service thereon issued out of said court, on the ground that said suit was a cause not of a local nature, and that service of citation was had and made without the territorial boundaries of the Eastern District of Texas, and was therefore of no force or effect (R. 10-11). Upon due consideration the Honorable Judge of the District Court of the United States for the Eastern District of Texas, sustained the motions to quash (R. 9). Thereupon the plaintiff below, admitting the jurisdiction of the Federal court over the subject matter of the litigation (R. 8), filed his motion to remand said cause to the State court, showing as his sole ground therefore that he was unable to obtain service upon the defendant within the Eastern District of Texas, and that, therefore, the jurisdiction of the Federal court was doubtful (R. 8-9). Petitioner, appearing specially only, thereupon in support of its plea to the jurisdiction, filed its opposition to the motion to remand (R. 8-9), but the Honorable Judge of the District Court of the United States for the Eastern District of Texas granted the motion to remand on January 20, 1936 (R. 6-7).

Petitioner sought and obtained (R. 15) leave of the United States Circuit Court of Appeals for the Fifth Circuit to file a petition reciting substantially the foregoing proceedings and orders, praying for the issuance of a writ of mandamus directed to the Honorable Randolph Bryant, Judge of the District Court of the United States for the Eastern District of Texas, and to said court, directing said judge and said court, and each of them, to vacate and set aside the order of said court remanding to the state court the cause above referred to, and praying for the issuance of a writ of prohibition prohibiting and enjoining the said judge of the District Court of the United States for the Eastern District of Texas and the said court, from remanding said cause to the State court (R. 1-6) and filed therewith exhibits supporting the allegations of said petition (R. 6-15). A show cause order was duly issued and in answer thereto the Honorable Judge of the District Court of the United States for the Eastern District of Texas, while admitting as substantially true the account of the record and proceedings had in cause No. 3352 upon the law docket of said court, as set forth in said petition, stated that he was of the opinion that his action in remanding said cause to the State court was authorized under 28 U. S. C. A. Sec. 80 (Sec. 37 Judicial Code) (R. 15-16). The decree and opinion of the United States Circuit Court of Appeals for the Fifth Circuit, denying the relief prayed for, was handed down on March 11, 1936 (R. 16-19), and thereafter, on March 30, 1936 (R. 19-20) petitioner duly and timely filed its petition for rehearing, which was on the 3rd day of April, 1936, denied (R. 21).

II.

Reasons Relied on for Granting the Writ.

(1) The decision of the United States Circuit Court of Appeals in holding that the remand of the case, involving no decision upon a question or issue of fact, said case being admittedly properly removed to a District Court of the United States, which had jurisdiction of the subject matter of the litigation (R. 8) and general jurisdiction of the cause (R. 18), was an exercise of judicial discretion to correct which the extraordinary remedies represented by writ of mandamus and writ of prohibition may not issue, is in conflict with the decisions of this Honorable Court in the cases of *Ex Parte Parker,* 120 U. S. 737, 30 L. Ed. 818; *Re Winn,* 213 U. S. 458, 29 Sup. Ct. 515, 53 L. Ed. 873; *Virginia* v. *Rives,* 100 U. S. 313, 25 L. Ed. 667; and *Virginia* v. *Paul,* 148 U. S. 107, 37 L. Ed. 386, 13 Sup. Ct. 536, fully discussed in the case of *ex Parte Harding,* 219 U. S. 363, 55 L. Ed. 252, 31 Sup. Ct. 34; the present instance representing the reverse of the situations in *ex Parte Roe,* 234 U. S. 70, 58 L. Ed. 1217, 34 Sup. Ct. 722, and *ex Parte Park Square Automobile Station,* 244 U. S. 412, 61 L. Ed. 1231, 37 Sup. Ct. 732, and justifying recourse to the extraordinary remedy authorized under the decisions in the above cases. The decision of the United States Circuit Court of Appeals is also in conflict in principle with the decisions of the same Circuit Court of Appeals in the cases of *Postal Telegraph-Cable Company* v. *Call,* 255 Fed. 850, and *United States Mortgage & Trust Company* v. *Dever,* 44 F. (2d) 913.

(2) The decision of the Circuit Court of Appeals insofar as it holds that the prohibition against allowance of appeal or writ of error from an order remanding a cause to a State court as set forth and contained in Section 28 of the Judicial Code (28 U. S. C. A. Sec. 71) should be read into Section

37 of the Judicial Code (28 U. S. C. A. Sec. 80), is in conflict with the decision of the United States Circuit Court of Appeals for the Fourth Circuit in the same matter in the case of *Travelers Protective Association of America* v. *Smith et al.*, 71 F. (2d) 511 and involves an important question of Federal law, which has not, but should be, settled by this Court.

(3) The decision of the United States Circuit Court of Appeals for the Fifth Circuit, in holding that the action of the Honorable Randolph Bryant, Judge of the District Court of the United States for the Eastern District of Texas, involving no decision upon any question or issue of fact, in remanding a cause, admittedly properly removed to said court to the State court from which same was removed, solely in order that the service of process could be obtained upon a necessary party, was a *proper* exercise of judicial discretion, involves an important question of Federal law which has not been, but should be, settled by this Court.

(4) The great importance of the statutes involved (Judiciary Act of March 3, 1887 as amended, Secs. 28, 29, 37, and 38 of the Judicial Code, Secs. 71, 72, 80, and 81, Title 28, U. S. C. A.) to the legal profession, and the need of an authoritative and elucidating decision, particularly as to the applicability or nonapplicability of the provisions of Section 28 of the Judicial Code (28 U. S. C. A., Sec. 71), prohibiting allowance of appeal or writ of error from a decision of a District Court of the United States remanding a case to a State court, to Section 37 of the Judicial Code (28 U. S. C. A., Sec. 80), and as to the definition of the limits of the proper exercise of judicial discretion in ordering the remand to a State court of a case admittedly properly removed to the Federal court.

(5) The action of the Honorable Randolph Bryant, Judge of the District Court of the United States for the

Eastern District of Texas, and of said court, involving no decision upon any question or issue of fact and, therefore, not in the exercise of judicial discretion, in remanding to a State court, in order that service of process may be had upon a necessary party, a cause admittedly properly removed to the Federal court, transcends the authority and jurisdiction of the said judge and the said court (*Travelers Protective Association of America* v. *Smith et al.*, 71 F. (2d) 511; *Lawrence* v. *Southern Pacific Company*, 180 Fed. 822), and involves an important question of Federal law which has not been, but should be, settled by this Court which has the jurisdiction to review and finally determine the question. *Gay* v. *Ruff*, 292 U. S. 25-40, 78 L. Ed. 1099.

WHEREFORE petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and proceedings of the said United States Circuit Court of Appeals for the Fifth Circuit, had in the cause numbered and entitled on its docket No. 8040 at Law, *In Re* Employers Reinsurance Corporation, praying for a writ of mandamus and a writ of prohibition, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States, and that the judgment herein of said United States Circuit Court of Appeals for the Fifth Circuit, be reversed by the Court, the relief prayed for by petitioner granted, and for such other and further relief as to this Court may seem proper.

Dated the 27th day of May A. D. 1936.

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Of Counsel.

BRIEF IN SUPPORT OF THE PETITION.

I.

Opinion of Court Below.

The opinion in the United States Circuit Court of Appeals for the Fifth Circuit (R. 16-19) is unofficially reported in 82 F. (2d) 373.

II.

1. The judgment of the United States Circuit Court of Appeals for the Fifth Circuit was entered March 11, 1936 (R. 10), and became final April 3, 1936 (R. 21), upon entry of order denying petition for rehearing.

2. The jurisdiction of this Court is invoked under the Circuit Court of Appeals Act of 1891, amended (March 3, 1891, Chapter 517, Section 6; 26 Stats. at L. 826, 828; Title 28 U. S. C. A. Section 347; Judicial Code, Section 240, amended) and under the provisions of Section 716 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, page 580; Title 28 U. S. C. A. Section 377; Judicial Code, Section 262).

3. The reasons relied on for the granting of the writ together with the references to the transcript and conflicts of authorities have already been stated in the preceding petition for writ of certiorari under paragraph II (pgs. 5-7), and are hereby adopted and made part of this brief. It may be stated in addition that it is earnestly urged by petitioner that when the cause below styled W. J. Clark *vs.* Employers Reinsurance Corporation, No. 3352, at law, in the District Court of the United States for the Eastern District of Texas was properly removed to that court (which is conceded, R. 2-4, 15, 18) the jurisdiction of the State court

absolutely terminated and that of the District Court of the United States attached since that court had jurisdiction of the subject matter (R. 8) and general jurisdiction of the case (R. 18) and that thereafter under the applicable provisions of Sections 29 and 38 of the Judicial Code (28 U. S. C. A. Secs. 72 and 81) the cause must be treated as though originally filed in the Federal court and that its action in remanding the case to the State court was *coram non judice*. It is submitted that these matters present important questions of Federal law and procedure which have not been, but should be passed upon by this Court, and that there is great need for an authoritative and elucidating decision thereon.

4. The cases believed to sustain the jurisdiction of this Court are as follows:

McClellan v. *Carland*, 217 U. S. 268, 54 L. Ed. 762, 30 Sup. Ct. 501;

Gay v. *Ruff*, 292 U. S. 25, 78 L. Ed. 1099;

Ex Parte Parker, 120 U. S. 737, 30 L. Ed. 818;

Re Winn, 213 U. S. 458, 29 Sup. Ct. 515, 53 L. Ed. 873;

Virginia v. *Rives*, 100 U. S. 313, 25 L. Ed. 667;

Virginia v. *Paul*, 148 U. S. 107, 37 L. E. 386, 13 Sup. Ct. 536 and *Ex parte Harding*, 219 U. S. 363, 55 L. Ed. 252, 31 Sup. Ct. 34.

III.

Statutes Involved.

The Statutes involved are Sections 28, 29, 37 and 38 of the Judicial Code (Title 28 U. S. C. A., Sections 71, 72, 80 and 81), which, so far as material, read as follows:

Judicial Code Section 28 (Section 71, Title 28, U. S. C. A.):

"Whenever any cause shall be removed from any State court into any district court of the United States,

and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed."

Judicial Code Section 29 (Section 72, Title 28, U. S. C. A.):

"The said copy being entered within said thirty days as aforesaid in said district court of the United States, the parties so removing the said cause shall, within thirty days thereafter, plead, answer or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in said district court."

Judicial Code Section 37 (Section 80, Title 28, U. S. C. A.):

"If in any suit commenced in a district court, or removed from a State court to a district court of the United States, it shall appear to the satisfaction of the said district court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

Judicial Code Section 38 (Section 81, Title 28, U. S. C. A.):

"The district court of the United States shall, in all suits removed under the provisions of this chapter,

proceed therein as if the suit had been originally commenced in said district court, and the same proceedings had been taken in such suit in said district court as shall have been had therein in said State court prior to its removal."

IV.

Statement of the Case.

Statement of the case has already been made in the preceding petition for writ of certiorari, under Paragraph I thereof (pgs. 2-4) which is hereby adopted and made a part of this brief.

V.

Specification of Errors.

The United States Circuit Court of Appeals for the Fifth Circuit erred:

1. In holding that the action of the Honorable Randolph Bryant, Judge of the District Court of the United States for the Eastern District of Texas, and said court, involving no decision upon any issue or question of fact, in remanding a cause, admittedly properly removed to the said court, to the State court in order that service of process could be made upon a necessary party, was an exercise either of judicial discretion or *proper* judicial discretion.

2. In holding that the prohibition against allowance of appeal or writ of error from an order, involving no decision upon any issue or question of fact, remanding a cause, admittedly properly removed to the Federal court, to a State court as said prohibition is set forth in Section 28 of the Judicial Code (Title 28, U. S. C. A., Section 71), should be read into Section 37 of the Judicial Code (Title 28, U. S. C. A., Section 80) so that writ of mandamus or writ of prohibition may not issue to revise or correct said order.

3. In failing to hold that the action which involved no decision upon any issue or question of fact, of the Honorable Randolph Bryant, Judge of the District Court of the United States for the Eastern District of Texas, and said Court, in ordering the remand of a case admittedly properly removed to the Federal court, to a State court for trial, transcended and exceeded the jurisdiction and authority of said judge and said Court and constituted an abdication of the authority and jurisdiction thereof to correct which writ of mandamus and writ of prohibition may issue.

VI.

ARGUMENT.

Summary of the Argument.

First Point. This Court has jurisdiction to review this case.

Second Point. The questions involved in this case have not been previously disposed of by this Court.

First Point.

This Court has jurisdiction to review this case.

Argument in Support of First Point.

As has been heretofore stated, the jurisdiction of this Court is invoked not only upon the conflicts in decisions recited on pages 5 and 6 of the petition herein, the importance of the question, and the need of an authoritative and elucidating opinion (petition, pgs. 6-7) but also under the provisions of the Circuit Court of Appeals, Act of 1891, amended (March 3, 1891, Chapter 517, Section 6; 26 Statutes at L. 826, 828; Title 28, U. S. C. A., Section 347; Judicial Code, Section 240, amended), and under the pro-

visions of Section 716 Revised Statutes of the United States (U. S. Comp. Stats. 1901, p. 580; Title 28, U. S. C. A., Sec. 377; Judicial Code, Section 262). Despite the prohibition against allowance of appeal or writ of error from an order remanding a case to a State court contained in Judicial Code, Section 28, (Title 28, U. S. C. A., Section 71) this Court may by certiorari review the action of a Circuit Court of Appeals in ordering the remand of the case. *Gay* v. *Ruff*, 292 U. S. 25, 78 L. Ed. 1099. This Court may on writ of certiorari to a Circuit Court of Appeals review the denial of an original petition for mandamus to compel a judge of a District Court of the United States to proceed with and determine an action pending in that Court. *McClellan* v. *Carland*, 217 U. S. 268, 54 L. Ed. 762, 30 Sup. Ct. 501. Mandamus lies where an inferior court refuses to take jurisdiction when by law it ought to do so or where having obtained jurisdiction (as here over the subject matter of the litigation, the sole defect being that it cannot proceed to judgment), it refuses to proceed in the exercise of such jurisdiction as it has. *Ex Parte Parker*, 120 U. S. 737, 30 L. Ed. 818; *U. S. Mortgage & Trust Company* v. *Deaver*, 44 F. (2d) 913. The court cannot abdicate its authority or duty in any case in favor of another jurisdiction. *Hyde* v. *Stone*, 20 How. 170, 15 L. Ed. 874. Where no issue of fact is decided the matter is one of law and no exercise of judicial discretion is involved. *Ex Parte Parker*, 120 U. S. 737, 30 L. Ed. 818; *Re Winn*, 213 U. S. 458, 29 Sup. Ct. 515, 53 L. Ed. 873; *Virginia* v. *Rives*, 100 U. S. 313, 25 L. Ed. 667; *Virginia* v. *Paul*, 148 U. S. 107, 37 L. Ed. 386, 13 Sup. Ct. 536, and *Ex Parte Harding*, 219 U. S. 363, 55 L. Ed. 252, 31 Sup. Ct. 34.

Second Point.

The questions involved in this case have not been previously disposed of by this Court.

Argument in Support of Second Point.

The underlying question in this case is the nature of the jurisdiction and control possessed by a District Court of the United States over a case admittedly properly removed to it. It is the belief of petitioner that in practically all of the cases found in the reports where a remand has been ordered there has been a failure of the Federal jurisdiction as such, *i.e.*, a failure of diversity of citizenship, or amount in controversy, etc. In such cases where a remand is granted the case stands upon the docket of the State court as though never removed, the theory being that the jurisdiction of the State court has never been terminated because the removal was improper and the action of the Federal court in ordering the remand does not add to or restore the jurisdiction of the State court. It only recognizes that it has never been terminated, only suspended. But upon a removal admittedly proper (R. 2-4, 15, 18), to a Federal court which has jurisdiction of the subject matter of the litigation (R. 8) and general jurisdiction of the cause (R. 18) the jurisdiction of the State court is so far terminated that the parties may not cause it to be remanded by agreement (*Lawton* v. *Blitch,* 30 Fed. 641) and the Federal court is invested with jurisdiction to the same extent as if the action had been originally instituted there. *Miller Parlor Furniture Company, Inc.,* v. *Furniture Workers Industry Union,* 8 Fed. Sup. 209. And the Federal court should proceed therein as if the suit had been originally commenced therein. *Judicial Code,* Sections 29 and 38 (Title 28, U. S. C. A., Sections 72 and 81). It follows therefrom when the jurisdiction of the State court has been so terminated by a proper removal, that it is beyond the power of a District Court of the United States, by remanding the case, to restore that jurisdiction. If this could be done the Federal court could transfer a case originally filed there,

to a State court. It follows also that the action of the Federal court under the circumstances of this case violates the applicable provisions of Sections 29 and 38 of the Judicial Code (Title 28, U. S. C. A., Sections 72 and 81), and transcends the jurisdiction and authority of that court. This is the underlying question involved and one which petitioner believes is of great importance as a matter of Federal procedure and practise and which it believes has never been passed upon by this Court and for which there is a great need for an authoritative and elucidating opinion. The cases of *Philipbar* v. *Derby*, 11 Fed. Sup. 709 and *Lawrence* v. *Southern Pacific Company*, 180 Fed. 822, involved this question and the latter probably would have been passed upon by this Court in the case of *Bogart* v. *Southern Pacific Company*, 228 U. S. 137, 57 L. Ed. 768, but for the statutes then in force which restricted the jurisdiction of the Supreme Court to the question only when it involved the jurisdiction of the Federal court as a Federal jurisdiction. Here it is not questioned that the Federal jurisdiction has attached but the case may not proceed to trial purely because of inability to bring before it the defendant, a lack of power under such circumstances common to all Courts. Petitioner earnestly urges that this question may now under the present statute enactments be reviewed by the Court and it is respectfully submitted that this case is one calling for the exercise by this Court of its powers to review by granting a writ of certiorari to review the decision herein.

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